

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1189

To be argued by
ALLEN R. BENTLEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1189

UNITED STATES OF AMERICA,

Appellee,

—v.—

LAWRENCE FRIEDMAN,

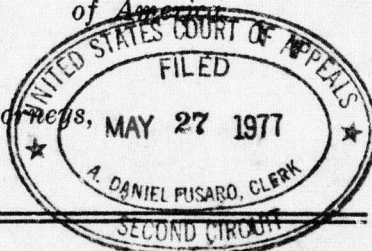
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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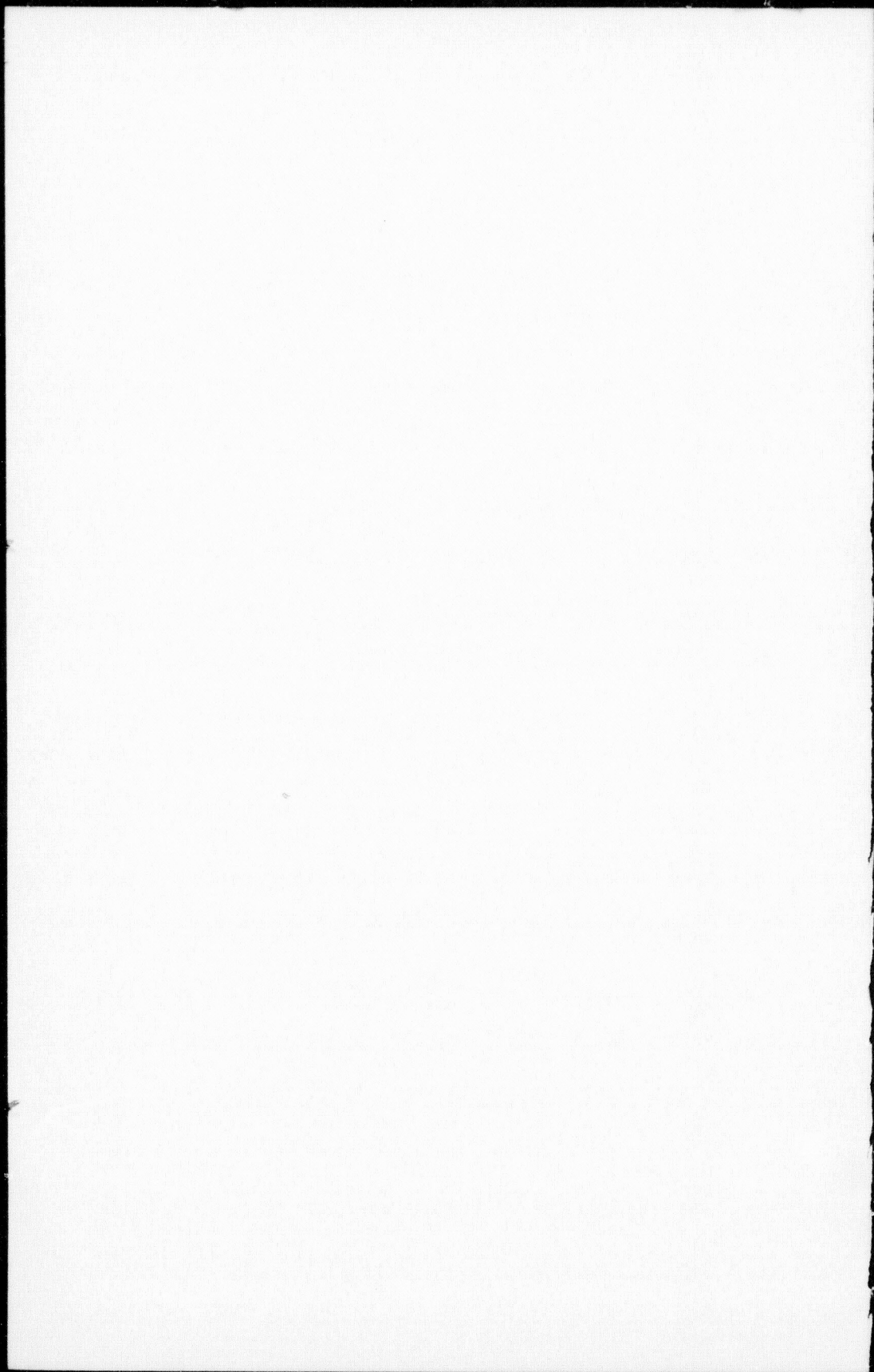


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UNITED STATES OF AMERICA,

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—v.—

LAWRENCE FRIEDMAN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Lawrence Friedman appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on March 4, 1977, upon his plea of guilty to Count One of Indictment 75 Cr. 1098 before the Honorable Morris E. Lasker, United States District Judge.*

Indictment 75 Cr. 1098, filed on November 14, 1975, and unsealed on January 6, 1976, charged Friedman and

* Friedman, in entering his plea, reserved the right to appeal from two pre-trial orders denying motions to dismiss the indictment. The Government consented to Friedman's reservation of the right to appeal, A. 418, pursuant to *United States v. Mulens*, 536 F.2d 997 (2d Cir. 1976), and *United States v. Faruolo*, 506 F.2d 490 (2d Cir. 1974). The issues raised by the pre-trial motions are those briefed on appeal.

seven others, in Count One, with conspiring to distribute and possess with intent to distribute Schedule II controlled substances, in violation of Title 21, United States Code, Section 846. Count Two charged Armando Suarez-Bolet and Jeffrey Rudd with distribution and possession, with intent to distribute, of a Schedule II controlled substance (60,000 quaalude tablets), in violation of Title 21, United States Code, Section 841 and Title 18, United States Code, Section 2.*

On May 13, 1976, Friedman moved to dismiss the indictment on the grounds (1) that Indictment 75 Cr. 1098 was based on leads obtained from him in violation of his right to remain silent while in custody, and (2) that prosecution of the indictment violated a promise of immunity made on September 25, 1975, by an Assistant United States Attorney of the District of New Jersey. On September 23 and 27, 1976, Judge Lasker heard testimony concerning the allegations on which Friedman's motion was based. On November 29, 1976, Judge Lasker denied the motion to dismiss.

* Five of Friedman's co-defendants entered pleas of guilty and were sentenced as follows:

<i>Defendant</i>	<i>Count</i>	<i>Date of Sentence</i>	<i>Sentenced Imposed</i>
Allen Finkel	One	July 9, 1976	18 months' probation
Gary Ugarte	One	July 9, 1976	18 months' probation
Jeffrey Nach	Two	July 23, 1976	30 months' probation
Jeffrey Rudd	One	July 26, 1976	Committed to the custody of the Attorney General under the Youth Corrections Act, 18 U.S.C. § 5010(b)
Bruce Berlin		December 3, 1976	12 months' probation

Russell Kory entered a plea of guilty to a superseding information charging him with violating 21 U.S.C. § 844 and on July 9, 1976 was sentenced to 18 months' probation. Saurez-Bolet jumped bail and remains a fugitive.

On December 30, 1976, Friedman filed a second motion to dismiss the indictment, alleging, *inter alia*, that the statutory scheme embodied in Title 21, United States Code, Section 811 constituted an unconstitutional delegation of power to the Executive Branch, and that the order of the Attorney General adding methaqualone to the list of controlled substances was invalid. On January 25, 1977, Judge Lasker denied the second motion to dismiss. Friedman's plea of guilty was then accepted with the stipulation that it did not constitute a waiver of his right to appeal from the denial of the pre-trial motions. On March 4, 1977, Judge Lasker suspended the imposition of sentence and placed Friedman on probation for a period of 18 months.

Statement of Facts

A. Synopsis

The first motion to dismiss the indictment rested on claims that Friedman, as a result of threats that his wife would spend a night at Rikers Island, had been coerced into making statements on September 24, 1975, and that the following day an Assistant United States Attorney of the District of New Jersey had promised him immunity from all related prosecutions in return for his cooperation with the Government, a promise that was broken when the indictment at bar was returned. The Government offered evidence to establish that Friedman's cooperation had been voluntary, and that no promise of immunity from prosecution had been made.

B. Background of the Motion

Lawrence Friedman was arrested by Federal agents in Clifton, New Jersey, on the evening of September 24, 1975, as he was about to sell 10,000 capsules of metha-

qualone for \$15,000 to Joseph Pollini, a New York City Police Officer acting in an undercover capacity. (A. 161).^{*} After his arrest, Federal agents were dispatched to arrest Friedman's wife, Margaret, who had participated in arranging the drug transaction at issue. (A. 155, 211-12). Friedman and his wife were transported separately to the New York offices of the Drug Enforcement Administration, 555 West 57th Street, New York, New York, for processing.

At the DEA offices, Margaret Friedman agreed to cooperate with the agents by making contact with Jeffrey Nach, the Friedmans' source for methaqualone. Margaret Friedman telephoned Nach and then, accompanied by agents, left the DEA offices to meet Nach. Nach was arrested. Margaret Friedman was released from custody on condition that she appear at the Office of the United States Attorney in Newark the following morning. After meeting with Lawrence Friedman, Nach agreed to cooperate and named his source, Jeffrey Rudd. (A. 105).

Friedman and Nach were lodged at the Metropolitan Correctional Center overnight. The following morning, the Friedmans, Nach, and two of the arresting agents met in Newark with Assistant United States Attorney Terence Flynn of the District of New Jersey. As a result of their discussions with Flynn, both Friedmans executed waivers of arraignment, and Lawrence Friedman agreed to cooperate with the authorities.

C. Defendant's Witnesses

Lawrence Friedman testified that he had been arrested at about 8:00 p.m. on September 24, 1975. The

^{*} Methaqualone is the pharmaceutical name of quaaludes. Subsequent references to pages of the appendix and to appellant's brief will be abbreviated as "A." and "Br.", respectively.

arresting agents did not advise him of his constitutional rights. (A. 166). They told him that his wife was to be arrested and would be incarcerated with lesbians at Rikers Island unless he revealed his source. (A. 96-97). When he arrived at the DEA offices, his wife was crying hysterically. (A. 100, 176). When he was allowed to speak to his wife, she told him that she had been threatened with incarceration at Rikers Island. (A. 104). The Friedmans then decided to reveal that Nach was their source. (A. 105). The next morning, Assistant Attorney Flynn gave Friedman a commitment that he would not be prosecuted on charges relating to the 10,000 quaalude tablets or any related matters. The commitment was conditioned on Friedman's continuing cooperation. (A. 108-10).

Margaret Friedman testified that at about 9:30 p.m. on September 24, 1975, she was arrested at the Friedmans' home in Nutley, New Jersey. (A. 34-35). She was confused and crying hysterically following her arrest. (A. 39). Agent Gray told her she was going to spend the night at Rikers Island unless she cooperated. (A. 39). The threat was reiterated at the DEA offices. (A. 41). Margaret Friedman sought permission to speak with her husband. (A. 43). After conferring, the Friedmans revealed that Nach was their source for quaaludes. (A. 43). The next morning, the Friedmans spoke with Assistant United States Attorney Flynn. Flynn told Lawrence Friedman that his anticipated career as a lawyer would not be ruined by the arrest (A. 45) because the charges would be dropped if Friedman cooperated. (A. 47).

D. Government's Witnesses

Agent Jeffrey Hall testified that after Friedman was arrested, he advised Friedman of his constitutional rights (A. 239, 252) and asked Friedman who his source was.

Friedman refused to say. (A. 253). At the DEA offices, Hall asked Mrs. Friedman if she would identify the source of supply. She agreed to reveal the source but said she wanted to speak with her husband first (A. 245), "not to ask him if it was all right to cooperate but just to let him know what she was going to do." (A. 259). She was permitted to speak with Friedman. (A. 245). The Friedmans pressed Hall for guarantees that Mr. Friedman would be able to continue in law school, but Hall replied that he could not give any guarantees. (A. 261). Margaret Friedman told her husband, "I'm going to do it. I'm going to go ahead and cooperate." (A. 262). Then Friedman agreed to cooperate. (A. 257). Margaret Friedman was serious and calm on the night of the arrest. At no time had Hall seen her acting hysterically or crying. (A. 246, 256).

Agent Michael "Scotty" Gray testified that he, agent Smith, and police officers from New York and New Jersey were assigned to arrest Margaret Friedman. (A. 211). After the arrest, Smith advised Mrs. Friedman of her constitutional rights (A. 212). During the trip to the DEA offices, she asked where women prisoners were incarcerated. Someone in the car mentioned Rikers Island. (A. 217). Gray described Margaret Friedman as quiet, solemn and almost "smart-alecky." (A. 215, 227). At the DEA offices, she was jovial. (A. 215). When Margaret Friedman was driven to New Jersey and met with Nach before the agents arrested him, she appeared composed and self-possessed. (A. 219-20). At the meeting between the Friedmans and Assistant United States Attorney Flynn (A. 221, 234-35), the fact that Friedman's cooperation would not bar a later prosecution was one of the major points continually made clear to Friedman. (A. 221).

Agent Alexander "Sandy" Smith placed Margaret Friedman under arrest at the Friedman residence (A.

267) and advised her of her constitutional rights. (A. 268). After processing at the DEA offices, Margaret Friedman agreed to cooperate, regardless of whether her husband cooperated or not. (A. 276). She gave Nach's name, and the agents asked her to make a consensually-recorded call to him. (A. 277). Margaret Friedman wanted to speak with her husband before actively cooperating to further the investigation. (A. 277). When they spoke, Friedman renewed his demands for assurances that he would not be prosecuted. Hall would give no such assurances. Finally, Mrs. Friedman told her husband that she was going to cooperate no matter what he wanted to do. (A. 278). Margaret Friedman was not hysterical (A. 270); on the contrary, she was quiet (A. 271), calm (A. 279) and a little bit jovial. (A. 280). During the photographing, Smith told her to "serious-up a little because it really wasn't much of a laughing matter, having been arrested". (A. 280, 309). At Assistant United States Attorney Flynn's office, Lawrence Friedman's efforts to obtain immunity from prosecution in exchange for cooperation were rebuffed by Flynn. Flynn told Friedman that he would be given no assurances whatsoever as to the ultimate prosecution or disposition of the case. (A. 287). Mrs. Friedman told her husband to sign the waiver of arraignment and be glad that he had at least avoided the filing of a formal charge that day. (A. 287).

Assistant United States Attorney Terence Flynn testified that he had interviewed the Friedmans on September 25, 1975. Friedman said he was a law student. (A. 133). Concerned about the potential damage that filing a complaint would cause, Flynn conferred with Smith. (A. 134). Flynn then told Friedman that proceedings could be suspended so that he could learn more about the case and about Friedman, and Friedman would have a chance to cooperate. (A. 134). Flynn refused to give

Friedman a guarantee that he would not be prosecuted. Flynn told Friedman to think about it while he spoke to Mrs. Friedman. Later, Friedman and his wife returned together. Friedman

"looked at the [waiver of arraignment] forms and he was concerned again, he wanted some assurances, and one of the things he said, 'So if I cooperate I could do all these things, I could cooperate, make cases, and you guys could still turn around and indict me, right?'"

"I said, 'Practically speaking, right. I can't give you any guarantees at this point.'" (A. 135-36).

Mrs. Friedman said "forget it, you know, that's all you are going to get" (A. 136). She and her husband then signed the waivers of arraignment and left.

E. The Opinion of the District Court

The opinion of the District Court was delivered from the bench on November 29, 1976. Judge Lasker found that the Government had sustained its burden of proving by a preponderance of the evidence that Lawrence Friedman's statements were voluntary in that

"I find that it was Mr. Friedman's conversation with his wife and his discovery in that conversation that she had decided to cooperate, and I think decided for very sound reasons, which persuaded him that he should also cooperate with the police in this case, and I agree with him, and I agree with her, that what they did was sound and mature and acting as good citizens.

"Under the circumstances, however, I do not find, and I do not believe it to be the case, that

either Mr. or Mrs. Friedman's will were overborne. They were both mature, knowing citizens. He had entered law school. They had a brush with the law before. They knew entirely what they were doing.

"There is no basis for dismissing the indictment on the claim that Mr. Friedman's right to remain silent while in custody were violated." (A. 395-96).

Judge Lasker's rejection of the claim that the instant prosecution was barred by immunity which Flynn had granted Friedman on September 25, 1975 was even more emphatic:

"I find no . . . promise [of immunity] to have been made by Mr. Flynn. To the contrary, a constant iteration to the fact that he could not guarantee what the outcome of the proceedings would be.

"I may say that the conclusion that the Government did not at any time promise not to prosecute Mr. Friedman on the absolute basis which he contends for any offense rising out of the narcotics sale that he attempted is supported by the fact that Mr. Friedman himself was extremely dilatory in asserting to this or any other court that the subsequent indictments were barred by Mr. Flynn's promise.

"While I find that his behavior in that respect, however, supports the conclusion that I reached, my conclusion is not based on the dilatory action of Mr. Friedman in taking the position that he now takes but in my crediting the testimony of Mr. Flynn, who impressed me as a very straightforward and sympathetic witness, sympathetic to the defendant himself.

"In short, I credit the testimony of Mr. Flynn, and accordingly find that the Government made no promise which it broke." (A. 392-93).

ARGUMENT

POINT I

The District Court Correctly Found That Friedman's Statements Were Voluntary.

Friedman contended in the District Court that his incriminatory post-arrest cooperation with the authorities—consisting of his participation in a meeting with Nach at the DEA offices after Nach's arrest, as a result of which Nach identified *his* quaalude source (A. 105, 225-26, 284)—had been coerced by threats that his wife would otherwise be lodged for the night at Rikers Island. (Br. at 7). Judge Lasker held the affidavits submitted by the parties sufficient to require a hearing to determine the issue of voluntariness. After hearing the witnesses, whose testimony provided a comprehensive account of the totality of the circumstances preceding the challenged statements, *Haynes v. Washington*, 373 U.S. 503, 513 (1963); *Lynum v. Illinois*, 372 U.S. 528, 534-35 (1963); *Fikes v. Alabama*, 352 U.S. 191, 197 (1957), Judge Lasker found that the Government had met its burden of proving by a preponderance of the evidence, *Lego v. Twomey*, 404 U.S. 477 (1972), that the conduct of the arresting agents "was [not] such as to overbear [Friedman's] will to resist and bring about confessions not freely self-determined." *Rogers v. Richmond*, 365 U.S. 534, 544 (1961). Accordingly, Friedman's motion was denied.

Judge Lasker based his ruling on a finding that it was Friedman's conversation with his wife at the DEA

offices, in which he learned that she had independently decided to cooperate, that motivated Friedman's decision to cooperate with the agents. (A. 395-96). In finding that the decision so made was rational and voluntary, Judge Lasker gave weight to Friedman's background, education, and experience with the criminal law. The District Court's findings, we submit, were fairly and reasonably based on evidence in the record and, in any event, were certainly not "clearly erroneous," as Friedman contends. *United States v. Lucchetti*, 533 F.2d 28, 36 (2d Cir. 1976) ("clearly erroneous" test applied to determination of voluntariness); see also *United States v. Pastor*, Dkt. No. 76-1364, slip op. 3633, 3638 (2d Cir. May 19, 1977); *United States ex rel. Delle Rose v. La Vallee*, 468 F.2d 1288, 1290 (2d Cir. 1972), *rev'd on other grounds*, 410 U.S. 690 (1973).

The finding that it was Friedman's learning that his wife had decided to cooperate that led him to make the same decision was supported by the testimony of agents Hall and Smith. Both Hall and Smith testified that Margaret Friedman's decision to reveal the source was made *before* she asked for and was granted an opportunity to speak with her husband. (A. 245, 276). Although Margaret Friedman's testimony on this point contradicted that of the agents (A. 43), and Hall and Smith differed on the peripheral question of whether or not Mrs. Friedman had given Nach's name before meeting with her husband (A. 259, 305-08), resolution of such contradictions and inconsistencies was the essence of the trial court's task as finder-of-fact at the hearing below. Judge Lasker's failure to credit the Friedman testimony is no basis for a claim of clear error requiring a contrary finding by this Court. *United States v. Faruolo*, 506 F.2d 490, 493 (2d Cir. 1974); *United States v. Fernandez*, 456 F.2d 638, 640 (2d Cir. 1972); *United States v. Frazier*, 434 F.2d 994 (5th Cir. 1970).

The record also demonstrates that Judge Lasker was correct in rejecting the contention that Friedman made incriminating admissions out of fear that Margaret Friedman would otherwise be incarcerated overnight at Rikers Island. Aside from the minimal concern shown by Lawrence Friedman for his wife's plight—a matter that Hall noticed (A. 255) and which is further evidenced by Friedman's constant preoccupation with the impact of the arrest on *his* career—the Friedmans' assertions that Margaret Friedman was hysterical and in tears at the DEA offices as a result of her impending Rikers Island incarceration were flatly controverted by Smith, Hall and Gray, as well as by Margaret Friedman's arrest photograph (A. 387), which shows her smiling. The composure demonstrated by Margaret Friedman, as recounted by the agents, was fully consistent with her experience as an educator and her prior arrest by the Nutley police. Moreover, the Rikers Island "threat" was not mentioned to Assistant United States Attorney Flynn, either on September 25 or in Lawrence Friedman's call to Flynn several days later (A. 180); the claim first surfaced in Friedman's pre-trial motion, more than seven months after the arrest. Under such circumstances, Judge Lasker could properly find that the mention of Rikers Island had not had the coercive impact attributed to it in the Friedmans' testimony, and that the Friedmans' recitations of the lurid predictions allegedly made by the agents were unfounded.

The final factor reinforcing Judge Lasker's holding on the issue of voluntariness was the undisputed evidence of Friedman's education and experience, matters that are "highly material" to his claim of coercion. *Fikes v. Alabama, supra*, 352 U.S. at 193. In September 1975, Friedman was 27 years of age (A. 91), had a bachelor's degree in psychology from Long Island University and a master's degree in educational psychology from Brooklyn

College, had taught in the New York City public school system, and was a student at Seton Hall Law School. (A. 93). The September 24th arrest was not Friedman's first encounter with the criminal law; he and his wife had both been arrested on a marijuana charge by the Nutley Police. (A. 228, 269). It cannot seriously be argued that Friedman's background rendered him "particularly susceptible to police pressure," *United States ex rel. Lewis v. Henderson*, 520 F.2d 896, 901 (2d Cir.), cert. denied, 423 U.S. 998 (1975). If anything, the aggressiveness and self-possession that Friedman demonstrated in bargaining with the agents and an Assistant United States Attorney for the most favorable disposition of his case mitigated strongly against a finding that his powers of reason and will had been overborne.

Friedman's claims received an extensive and thoughtful hearing in the District Court, which applied the proper legal standard to its findings on the controverted facts and ruled against Friedman's position.* Whether or not findings in Friedman's favor would have been warranted by the record, Friedman should not be permitted to relitigate plainly supportable factual determinations on the ground that they were "clearly erroneous."

* Friedman, Br. 29, misperceives the import of Judge Lasker's citation of *United States v. Collins*, 362 F.2d 792 (2d Cir. 1972). Since there was testimony that Friedman, after receiving the *Miranda* warnings, had initially refused to speak with the agents about his source, renewed questioning in the absence of "a reasonable basis for inferring that [he had] voluntarily changed his mind," 462 F.2d at 802, might have violated *Miranda*, even in the absence of allegedly coercive threats. Judge Lasker found that Margaret Friedman's decision to cooperate and subsequent conversation with her husband provided a reasonable basis for renewed questioning of Friedman.

POINT II**The District Court Correctly Found that Assistant United States Attorney Flynn Did Not Promise Immunity to Friedman.**

The second branch of Friedman's first motion was the claim that Assistant United States Attorney Flynn had promised Friedman, in return for the latter's promise to cooperate, that he would not be prosecuted. Appellant and his wife testified that such a promise had been made. Assistant United States Attorney Flynn and agents Smith and Gray testified that Friedman, after unsuccessfully seeking such a promise, had followed his wife's suggestion and accepted a "waiver of arraignment" procedure as the most favorable disposition to be obtained. Judge Lasker expressly credited Flynn's testimony and found that Flynn had merely agreed to postpone the filing of a formal charge until his office had all the facts. Friedman's argument that Judge Lasker's factual finding on this point should be overturned, Br. 34, is refuted by the wording of the agreement itself, by Flynn's explanation of the purpose of the agreement, and by Friedman's conduct after the alleged oral promise of non-prosecution was assertedly broken.

The waiver of arraignment agreement signed by Friedman provided:

"I, Lawrence Friedman, having been advised of my right to a speedy arraignment after having been taken into custody by Federal Agents, do hereby waive that right in consideration of the suspension of further criminal proceedings against me, until such time as the United States Attorney shall have had the opportunity to evaluate my case in terms of proceeding under a program of deferred prosecution." (A. 13).

The document contains no whisper of the sweeping oral promise—covering not only the charge upon which Friedman had been arrested in New Jersey, but state charges in Brooklyn, New York and related charges, wherever they might be lodged—that Friedman claims he received from Flynn on September 25, 1975.

Flynn explained that the waiver of arraignment had been executed so that Friedman would not be prejudiced by the filing of a complaint in the event that Flynn's office eventually decided not to prosecute Friedman.* This explanation fully comported with the language of the agreement and was amply supported by other evidence in the record. The record shows that Flynn had no familiarity with the case when he was assigned to handle the arraignments of the Friedmans and Nach. As Flynn put it, "the first day of the arrest you don't have all the facts of the case before you." (A. 141). Nor is it accurate to argue that the DEA agents present (Smith and Gray) could have provided Flynn with such facts as would have permitted an on-the-spot final determination of whether or not to prosecute. Although local police from New York and New Jersey who had previously dealt with Friedman were present at his arrest (as Friedman notes, Br. 35), none of the local law enforcement officers familiar with the preceding investigation were debriefed by Flynn the next morning. The DEA agents who were present in Flynn's office had only entered the case a day or two before.

* A complaint was filed as to Nach on September 25, 1975, even though he too was cooperating. (A. 186). Flynn testified that the waiver of arraignment procedure was not even considered until Friedman, *after* indicating a desire to cooperate, revealed to Flynn at the end of the interview that he was a law student. (A. 133, 285, 317). These facts further counter Friedman's argument that the waiver of arraignment was a promise not to prosecute given in exchange for his pledge of cooperation.

(A. 213).^{*} Even if Flynn could have been given all the facts on the morning of September 25th, finally, Flynn's explanation that additional time was needed to consider the possibility of deferring prosecution—a highly unusual action in a drug case, as Smith remarked (A. 109)—was certainly not so improbable as to render Judge Lasker's acceptance of it "clearly erroneous."

The final factor demonstrating that Friedman did not receive a promise of immunity from Flynn is Friedman's acquiescence in a succession of indictments and bookings which occurred, in the months following his meeting with Flynn, in jurisdictions other than the District of New Jersey. On October 8, 1975, Friedman was arrested at the Kings County District Attorney's Office on a state indictment based on his Brooklyn transactions with Officer Polini. (A. 181). On January 8, 1976, he surrendered to the Office of the United States Attorney for the Southern District of New York after the indictment in this case was unsealed. Yet Friedman never contacted Flynn about the purported breach of the agreement and did not file the motion to dismiss the indictment in this case until May 13, 1976, more than four months after he surrendered and had counsel assigned. Judge Lasker properly weighed this inaction in concluding that the "promise" said to have been made by Flynn was merely a figment of the Friedmans' wishful imaginations.

In addressing the question of whether or not Flynn had promised immunity to Friedman, the District Court

^{*}Federal agents had been enlisted when a New York City Police Department undercover investigation of Friedman expanded into New Jersey and required additional funds. (A. 213). Thus Smith did not learn of the undercover purchases of drugs from Friedman which had occurred in Brooklyn until after leaving Flynn's office. (A. 289, 31).

was required to resolve the substantial conflicts in the proof adduced at the hearing by crediting or rejecting the testimony offered by the parties.* In so doing, Judge Lasker could properly consider the demeanor of the witnesses, their prior statements—including Friedman's false statement to Assistant United States Attorney John Flannery of the Southern District of New York, on January 8, 1976, that he had never been arrested, for which he offered a disingenuous and only partial explanation**—the motives which might affect their recollection, and all the other factors which are weighed in the appraisal of testimony. Given the narrow scope of appellate review which must be applied to Judge Lasker's findings, *United States v. Pfingst*, 490 F.2d 262 (2d Cir.), *cert. denied*, 417 U.S. 919 (1973), based as they are on an evaluation of the credibility of the witnesses and in particular on Judge Lasker's assessment of Flynn as "straightforward and sympathetic . . . sympathetic to the defendant himself" (A. 393), the judgment below should be affirmed.

* Judge Lasker appraised the case as raising straight forward questions of credibility. (A. 383). His comment that a rejection of one party's witnesses "doesn't necessarily mean that anybody has lied on the stand" (A. 385) was not "an acknowledgment by the Court of the credibility of the Friedmans," Br. 13, but an observation that Friedman and his wife had "gone far toward persuading themselves" (A. 391) of events that had not in fact occurred.

** Friedman testified that he did not mention the Clifton arrest because he had been told that he was no longer under arrest. (A. 190). He had no explanation for his omission of the Brooklyn arrest and the Nutley, New Jersey marijuana arrest. Judge Lasker commented: "If you did not intentionally lie [to Flannery] you must be awfully stupid." (A. 192).

POINT III**The Delegation of Power to the Attorney General
was Constitutional.**

Friedman's final claim is that the statutory scheme empowering the Attorney General to classify, reclassify, and declassify drugs following legislative standards and under certain prescribed procedures is unconstitutional. As he recognizes, the precise issue has been pending before this Court in the appeal of Pastor and Weiner from a decision of Judge Motley. Since the filing of Friedman's brief, Judge Motley's decision has been affirmed in an opinion upon which we reply. *United States v. Pastor*, Dkt. No. 76-1364, slip op. 3633, 3649-55 (2d Cir., May 19, 1977).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ALLEN R. BENTLEY, being duly sworn deposes
and says that he is employed in the office of the United States
Attorney for the Southern District of New York.

That on the **27TH** day of **MAY, 1977**
he served ~~two~~ ^{one} copy of the within brief by placing the same in a
properly postpaid franked envelope addressed:

FREDERICK H. BLOCK
919 THIRD AVENUE
NEW YORK, NEW YORK 10022

And deponent further says that he sealed the said envelope and
placed the same in the mail box for mailing ^{outside of} the United States
Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Allen R. Bentley

Sworn to before me this

27 day of May, 1977
Jeanette Ann Grayed

JEANETTE ANN GRAYED
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979